

## **EXHIBIT 4**

**COMMONWEALTH OF MASSACHUSETTS****PLYMOUTH, ss****SUPERIOR COURT  
CIVIL ACTION NO. : PLCV2004-1105**

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**BAY MORTGAGE SERVICES, INC.  
and PETER J. LUCIDO  
Plaintiff****vs.****U.S. BANCORP  
Defendant**

\*\*\*\*\*

**DEFENDANT'S MOTION TO DISMISS**

Now comes the Defendant, U.S. Bancorp, as Assignee of Norvergence, Inc., and hereby moves this Court to Dismiss the Plaintiff's Complaint pursuant to M.R.C.P. 12(b)(2) and/or (b)(3) on the grounds that parties to this action agreed by written contract that the exclusive jurisdiction and/or venue for the claims asserted by the Plaintiff must be the state or federal Court located in the State of Minnesota, not the Commonwealth of Massachusetts. In support of its Motion, the Defendant states the following:

1. On or about September 15, 2004, the Plaintiff commenced this action against the Defendant for fraud, breach of warranty and violation of M.G.L. c. 93A, arising out an Equipment Rental Agreement (the "Agreement"). A copy of the Agreement is attached hereto as Exhibit "A."

2. Pursuant to the Agreement, the Defendant's Assignor, Norvergence, Inc., is identified as the "RENTOR" and Bay Mortgage Services, Inc., the Plaintiff in this action, is identified as the "RENTER".

3. The APPLICABLE LAW provision of the Agreement, provides, in relevant part:

This Agreement will be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located, or if this lease is assigned by Rentor, the State in which the assignee's principal offices are located... and all legal actions relating to this lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's Assignee's sole option (emphasis added).

4. There can be no dispute that the Defendant in this action is the Assignee of the Rentor.

A copy of the operative Assignment between US Bancorp and Norvergence, Inc. is annexed hereto as Exhibit "B." Indeed, as a result of the Assignment, U.S. Bancorp has been named as the Defendant.

5. By virtue of the Assignment, and as a result of the clear and unambiguous jurisdictional language of the Agreement, jurisdiction for the Plaintiff's asserted claims properly lies in the State of Minnesota, not in the Commonwealth of Massachusetts. Dismissal, therefore, is warranted, consistent with well-settled Massachusetts legal precedent, which provides that the Courts must give effect to...freely negotiated forum selection clauses." KKW Enterprises, v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42, 52 (1<sup>st</sup> Cir. 1999), quoting Snyder v. Smith, 736 F.2d 409, 419 (7<sup>th</sup> Cir. ). Here, there is no basis not to uphold what appears to be nothing more than a freely negotiated forum selection clause.

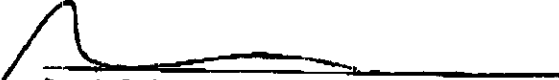
WHEREFORE, the Defendant requests this Court to allow its Motion, to Dismiss this law suit with prejudice as to the filing of any further action by the Plaintiff against the Defendant in the Commonwealth of Massachusetts, and to enter such other relief as it deems just and

- proper.

Respectfully submitted,  
U.S. Bancorp, as Assignee of Norvergence, Inc.  
By its attorneys,  
Cohn & Dassi, LLC,

Date:

9/24/04



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Lewis J. Cohn, Esq. BBO# 553803  
Michael H. Theodore, BBO# 565098  
25 Burlington Mall Road, Sixth Floor  
Burlington, MA 01803  
(781) 494-0200

CERTIFICATE OF SERVICE

I, Michael H. Theodore, hereby certify that on this 24<sup>th</sup> day of September, 2004, I caused to be served by first class mail, postage pre-paid, a copy of the foregoing Motion to Dismiss upon:

Allan J. Costa, Esquire  
Triffetti & Costa, P.C.  
125 Long Pond Road, Suite 20  
Plymouth, MA 02360

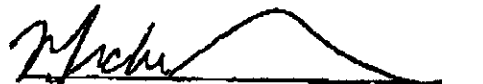
  
Michael H. Theodore

Exhibit A

NorVergence

APR 23 2004

## Equipment Rental Agreement

Rental Number 15310

Renter (Full Legal Name) NorVergence, Inc.				Renter (Full Legal Name) BAY MORTGAGE SERVICES INC			
Address 600 Broad St 2nd Floor				Address 90 Broad Street Office Park, 301			
City Newark	State NJ	Country USA	Zip Code 07102	City Bridgeton	State MA	Country USA	Zip Code 01914
Telephone Number 973-349-7800				Telephone Number 908-853-3000		Federal Tax ID Number 043107715	
						State of Organization 1990	

Dear Customer: We've written this Equipment Rental Agreement (the "Rental") in simple and easy-to-read language because we want you to understand its terms. Please read this Rental carefully and feel free to ask us any questions you may have about it. We use the words you and your to mean the Renter indicated above. The we, us and our refer to the Renter indicated herein.

Rental Agreement: We agree to rent to you and you agree to rent from us the Equipment listed below (the "Equipment"). You promise to pay us the Rental Payments shown below according to the payment schedule below.

Quantity	Equipment Model & Description	Serial Number
1	MATRIX™ 2003	3 Cords
17	CCS Sets	

Equipment to be new unless otherwise noted: Used ☐ Reconditioned ☐

Equipment Location (if different from Renter address above)  
Address

City State Country Zip Code Renter Contact Name Telephone Number

Transaction Taxes: Rental Payment \$ 1,328.36 (plus applicable taxes)

Security Deposit \$ 0

RENTAL TERM 60 Months

If I checked the first payment is due approximately 60 days after date of acceptance.

Your acceptance shown above may not include any applicable tax. If any taxes are due, you warrant us to pay that tax when it is due and agree to reimburse us by making a change to your Rental Payments. You warrant us to keep us advised of any change in tax information on the Rental we will add you make of such changes. Payments will be applied first to past due balance, interest, then to late charges, and then to the current amount due.

You agree to all the terms and conditions shown above and the reverse side of this Rental, that these terms and conditions are a complete and exclusive statement of our agreement and that they may be modified only by written agreement between you and us. Terms or conditions which are not contained in this Rental may not be legally enforceable. You also agree that the Equipment will not be used for personal, family or household purposes. You acknowledge receipt of a copy of this Rental. Your obligations to make all Rental Payments for the entire term are not subject to and not, with holding or deduction for any reason whatsoever.

This Rental is not to be used to sell or lease to a third party. You warrant us to return a UCC-9 financing statement or similar instrument, and appear on any other proceedings to discuss and deliver such instrument, in order to show our interest in the Equipment.

THIS RENTAL MAY NOT BE CANCELLED OR TERMINATED EARLY.

Renter: NorVergence, Inc.	Renter: Bay Mortgage Services Inc
By: X <u>Charles Johnson - Dir. Analyst</u>	By: X <u>Peter Lucio</u>
Accepted on behalf of Renter on: 5-6-04	Name (print): Peter Lucio
	Date/Title: 3/18/04, President

You agree that a facsimile copy of this Rental bearing signatures may be treated as an original.

Warranty: In this warranty, you agree the warranty is provided to you, and we, and our rent to the Renter indicated above. You will immediately, fully and honestly guarantee that the Renter will make all payments and pay all the other charges required under this Rental and under any other agreement between the Renter and us (the "agreement") when they are due and will perform all other obligations under the agreement fully and promptly. You also agree that we may make other arrangements with the Renter and you will not be responsible for those payments and other obligations.

We do not have to tell you if the Renter is in default. If the Renter defaults, you will immediately pay to us the full amount of the Rental and all other charges under the terms of this Rental and you will perform all other obligations of the Renter under this Rental. It is not necessary for us to proceed with legal action against the Renter before enforcing this warranty. You will indemnify us for all the expenses we incur in enforcing and our rights against the Renter or you, including attorney fees. THIS SAME STATE LAW AS THE RENTAL WILL GOVERN THIS WARRANTY. YOU AGREE TO JURISDICTION AND VENUE AS STATED IN THE PARAGRAPH TITLED APPLICABLE LAW OF THE RENTAL.

Personal Guaranty: By: X (sign) <u>Peter Lucio</u> individually	Personal Guaranty: By: X (sign) _____ individually
Name (print) Peter Lucio	Name (print) _____

11-28-2003

## APR 23 2006

[illegible]

**SECURITY DEPOSIT:** We will retain any required security deposit to ensure your performance of your obligations. Any security deposit is non-refundable. We may, but are not obligated to, apply any security deposit to cover any default by you, in which event you will promptly return any retained amount, if you are not in default. Any security deposit will be returned to you within 60 days after the end of the original or renewed Rental Term for an apartment occupied by applicable law, or at your direction we may apply the security deposit towards your purchase of the Equipment if you want to use a purchase discount.

**STatement of Earnings:** Do you have a separate account, or do you not put the deposits on the end of the month? You and I have discussed the importance of any financial statement you have. Do you ever deposit in the universal bank? This deposit must be made for the deposit in connection with the shareholder's responsibility of obligations. Such deposit is to "transfer" the "Company" with the purpose of the "Universal" bank of the company, and is immediately available for use by a third party, such as a partner, after two years, without the need for any special or extraordinary. All deposits must be free of interest. You will pay the full amount of the deposit in the form of a check, and the company will pay the interest. You will deposit in the company's account the full amount of the deposit, and the company will pay the interest.

ARTICLE 2A STATEMENT: YOU AGREE THAT IF ARTICLE 2A OF THE UNIFORM COMMERCIAL CODE IS HELD TO APPLY TO THIS RENTAL, THE RENTAL WILL BE CONSIDERED A FINANCE LEASE THEREUNDER. YOU WAIVE YOUR RIGHTS AND REMEDIES UNDER ARTICLE 2A OF U.C.C.

[illegible]

**ADDITIONAL SERVICES:** To request copies of your billing or payment history or for other information or services with respect to your loan, please contact us. You will be charged a reasonable fee for these services.

**OTHER CONDITIONS:** You are not using and using this

[illegible]

By any level of this financial position, we are low in a state where the financial is very low. When the government there starts to pay and goes to the extent of the market that this will not provide the rest of the fund.

1. **NO SURRENDERING:** We are sending the equipment to you "AS IS," WE MAKE NO WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITS, OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THE EQUIPMENT IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER FACT OR LAW, AND WITHOUT ANY REPRESENTATION OR WARRANTY, EITHER WRITTEN OR ORAL, BY THE MANUFACTURER, THE SUPPLIER, OR US. WE MAKE NO WARRANTY OF ANY KIND, EITHER FACT OR LAW, AND WITHOUT ANY REPRESENTATION OR WARRANTY, EITHER WRITTEN OR ORAL, BY THE MANUFACTURER, THE SUPPLIER, OR US. WE MAKE NO WARRANTY OF ANY KIND, EITHER FACT OR LAW, AND WITHOUT ANY REPRESENTATION OR WARRANTY, EITHER WRITTEN OR ORAL, BY THE MANUFACTURER, THE SUPPLIER, OR US.

YOU UNDERSTAND THAT APT ASSUMING IS A SEPARATE AND INDEPENDENT COMPANY FROM HEMETOR MANUFACTURER AND THAT NEITHER WE NOR ANY OTHER PERSON IS THE ASSUMING'S AGENT. YOU AGREE THAT NO REPRESENTATION, GUARANTEE OR WARRANTY BY THE HEMETOR OR ANY OTHER PERSON IS BEING OR CAN BE MADE, AND NO PERSON OR ANY OTHER PERSON WILL BEHAVE YOUR OBLIGATIONS TO ANY AGENT.

Director, Please bill if submitting the  
spreadsheet.

[illegible]



Exhibit B

## ASSIGNMENT

RE: Agreement No. 15310, dated 5-6, 2004between Prm Mortgage Services Inc.

as Customer and the undersigned as nominal Owner (the "Agreement").

The undersigned hereby sells, assigns, and transfers to U.S. Bancorp Business Equipment Finance Group all of the undersigned's right, title, and interest in and to (a) the equipment covered by the Agreement and (b) the undersigned's rights as Owner under the Agreement, including the right to receive rent thereunder.

No. Vergence  
(Name of Owner)Berkley L. L. L. C.  
SignatureDoc Analyst  
Title5-6-04  
Date

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss

FILED  
IN CLERKS OFFICE  
SUPERIOR COURT  
CIVIL ACTION NO. 04-513  
2004 OCT 20 P 5  
2004-1105

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BAY MORTGAGE SERVICES, INC.  
and PETER J. LUCIDO

Plaintiffs,

vs.

U.S. Bancorp,

Defendant

\*\*\*\*\*


U.S. DISTRICT COURT  
DISTRICT OF MASS.

**NOTICE OF FILING OF NOTICE OF REMOVAL**

Defendant U.S. Bancorp hereby gives notice that it has filed the attached Notice of Removal with the United States District Court for the District of Massachusetts under 28 U.S.C. § 1446.

Respectfully submitted,  
U.S. Bancorp  
By its attorneys,  
Cohn & Dussi, LLC,

Dated: October 20, 2004

  
Lewis J. Cohn, Esq., BBO# 553803  
Michael H. Theodore, BBO# 565098  
25 Burlington Mall Road, Sixth Floor  
Burlington, MA 01803  
(781) 494-0200

**CERTIFICATE OF SERVICE**

I, Michael H. Theodore, hereby certify that on this 20<sup>th</sup> day of October, 2004, I caused to be served by first class mail, postage pre-paid, a copy of the foregoing Notice of Filing of Notice of Removal upon:

Allan J. Costa  
Triffletti & Costa, P.C.  
124 Long Pond Road  
Plymouth, MA 02360

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